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Supreme Court of the United States. (and

Hayne & Pillsbury for Appellees

OCTOBER TERM, 1897.

Filed Feb. 5, 1898.

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JAMES P. MERRITT AND HENRY P. MERRITT,
APPELLANTS,

vs.

THE PRESIDENT AND TRUSTEES OF BOWDOIN COLLEGE AND OTHERS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

ON A MOTION TO DISMISS.

BRIEF OF APPELLEES IN REPLY.

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In so far as appellants' brief purports to answer the brief in support of the motion, very little seems to be called for from the appellees, by way of reply.

The appellants having failed to show that the constitutionality of the provision of section 1 of the act of March

3, 1887, c. 273 (24 Stat., 552), as corrected by the act of August 13, 1888, c. 866 (25 Stat., 433), conferring original cognizance on the Circuit Courts of all suits "in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," was drawn in question, it follows, inevitably, that the objection to the jurisdiction of the Circuit Court, on the ground that the suit is a controversy between citizens of the same State, involves no question arising under the Constitution of the United States. Conceding all that is stated in the assignments of error, and we need go no further, it is plain that no question arising under the Constitution could have been in issue in the court below, for it is little short of absurd to say that such a question would not have been covered by an assignment of error.

If, however, for any reason, a question thus in issue was omitted from the assignments of error, then it lay on the appellees to show, by the record, that such question was actually in issue. The burden was on them, and they having failed to take it up, the inference from the errors assigned stands confessed.

There is enough conceded in the opposite brief to show that the positions taken in the brief of appellees are well founded, nor is it pretended that the assignments of error are not correctly presented in the latter brief.

But to what end should the record, or any part thereof, be printed, for the purposes of this motion, in view of the opinion of Judge McKenna, disposing of the jurisdictional objections in the court below? This opinion is a part of the record, and is also reported in the Federal Reporter (Vol-

ume 63, p. 213), and contains every fact bearing on the questions of jurisdiction raised in the Circuit Court. This opinion is, also, cited in our original brief (p. 15).

But it is said, without a particle of support in the assignments of error, that appellants were deprived of the "protection" given by the 10th Amendment of the Constitution, which reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

What "protection" appellants could have derived from this declaration of a principle of constitutional interpretation is not evident, by any means.

The point made in the brief, on this head, is as follows:

> The record will further show that appellant, Henry P. Merritt, was not brought into the Circuit Court or made a party to this suit until he had begun an action in the State Superior Court, and then only for the purpose of enjoining such action. His right to maintain that action is secured by the Tenth Amendment of the Federal Constitution. He invoked in vain in the Court below both the "construction or application" of Article III, and the protection given by the Tenth Amendment (pp. 14, 15).

This point is completely exploded by the opinion of Judge McKenna, before whom was heard the application of appellees, complainants below, for leave to file a supplemental bill making the said Henry P. Merritt a party defendant, and for an injunction to restrain the prosecution of an action commenced by him in the Superior Court of Alameda County, California.

The opinion, which is contained in the record, and also reported in the Federal Reporter (Vol. 59, p. 6), states, that the objection to filing the supplemental bill turned on sec-

tion 720, Revised Statutes, and makes no reference, whatever, to the Constitution.

The learned judge thus disposes of the grounds of opposition to filing the supplemental bill:

> The object of the supplemental bill is to make Harry P. Merritt a party defendant in this action, and enjoin him from the further prosecution of said suit in the State court. But it is urged by his counsel that his cause of action is independent of that of the other Merritt, though it may require the decision of the same questions, and that an injunction restraining him is prohibited by section 720 of the Revised Statutes. It is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." In Sharon *vs.* Terry, 36 Fed. 265, this section was held by Judges Field, Sawyer, and Sabin not to apply, where the Federal court has first obtained jurisdiction. Justice Field, delivering the opinion of the court, said, "In such cases the Federal court may restrain all proceedings in a State court which would have the effect of defeating or impairing its jurisdiction." In support of this the learned justice cited Fisk *vs.* Railroad Co., 10 Blatchf. 520; Wagner *vs.* Drake, 31 Fed. 851; French *vs.* Hay, 22 Wall. 250; Dietzsch *vs.* Huidekoper, 103 U. S. 494. The suit of complainants in this court was prior in time to Merritt's suit in the State court; and it is very clear, if he should succeed in having a receiver appointed of the property, the jurisdiction of this court would be very much embarrassed, if not defeated or impaired. If, therefore, this court had jurisdiction of said Merritt at the time he commenced his suit, it can and ought to enjoin its further prosecution.
>
> When a court obtains jurisdiction of a defendant is clear. It is by service of process upon him, or his voluntary appearance. The appearance of the plaintiff is always voluntary. He invokes jurisdiction by filing a petition, bill, or complaint, or it may be jurisdiction in equity can be invoked for him, if he have a common interest with others, and some of them should sue for themselves and all others, including him. The bill in this case was filed, not only on behalf of plaintiffs by name, but on behalf of all others interested, of whom Merritt was one. In a sense, he was a party to the action. Indeed, a suit which is brought by some and not by all the parties having a common interest must be brought on behalf of all interested, or it would be demurrable for want of proper parties. Story, Eq. Pl. § 107. And such a bill binds the

rights and interests of the others. *Id.* § 128. The right of a few to sue for all existing, with power in the suit to bind the right and interest of all, it would not be unreasonable to contend, would give a jurisdiction which could be protected from an attempt to impair or defeat it by a subsequent suit by any of the parties interested, in another court. But this need not be insisted on. It was certainly open to Merritt to come into the action, and he filed a petition to intervene. By this, complainants contend, he appeared, and submitted to the jurisdiction of the court.

It is manifest, therefore, that, as no question involving the Constitution is "distinctly deducible from the record," the cause must be dismissed for want of jurisdiction.

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